United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

728

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO 23,464

UNITED STATES OF AMERICA,

- vs -

WILLIE WHITAKER,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
FOR THE DISTRICT OF COLUMBIA

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Attorney for Appellant
Appointed by this Court.

STATEMENT OF POINTS

1. There was no probable cause.

2. The Court erred when it did not grant Appellant's Motion for Judgement of acquittal.

3. The Government did not sustain its burden of proof and the evidence did not prove Appellant guilty of the offenses charged beyond a reasonable doubt.

4. Evidence did not support convictions of Second Degree Burglary or Grand and Petit Larceny.

This case has not previously been before this Court.

References to Rulings - None

STATEMENT OF QUESTIONS PRESENTED

1. Can accused be tried for commission of crimes when there is no Probable Cause shown?

2. Is Preliminary Hearing vital process in criminal prosecution?

3. Should motion for acquittal be granted when there is no evidence connecting accused with crimes charge?

4. Are statements allegedly made that could be construed as self-incriminating admissible into evidence when said statements are obviously made under duress and coercion?

5. Can conviction of crime stand when all the essential elements of said crime have not been proved by the Government?

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AUTHORITIES

*Cases chiefly relied on.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a Judgment of Conviction of the United States District Court for the District of Columbia of the offense of Burglary II (22 D. C. Code 1801(b) and Petit Larceny (22 D. C. Code 2202). The jurisdiction of this Court is invoked under the provisions of Section 1291, Title 28, U.S. Code.

STATEMENT OF THE CASE

On the 26th day of November, 1968, the Grand Jurors of the United States of America, in and for the District of Columbia presented Appellant, Willie Whitaker, for Second Degree Burglary, Grand Larceny and Petit Larceny. Subsequently, there was filed on December 17, 1968, in Criminal No. 2045-68 (Grand Jury Original) a four count indictment charging that on October 6, 1968, Appellant, allegedly committed the Crime of Second Degree Burglary and Grand Larceny and on October 7, 1968, Appellant allegedly committed the crime of Second Degree Burglary and Petit Larceny.

On March 4, 1969, this cause came on for trial before the Honorable Edward M. Curran, Chief Judge, United States District Court for the District of Columbia without a jury and ended on the same day resulting in Appellant being found guilty on Counts 1 and 3 (Burglary II) and guilty of Petit Larceny on Counts 2 and 4. From this conviction Appellant appeals.

The record below indicates that the Appellant was never arrested and charged by the authorities with the commission of these or any other crimes. The record below further indicates that the Appellant did not have a preliminary hearing to determine if there was probable cause to believe that a crime had been committed and if so, whether or not there was probable cause to believe that Appellant committed said crime. As a matter of fact as was clearly shown in the evidence at the trial Appellant did not know anything about this

case at all until December 17, 1968, when he received an indictment from the Grand Jury (TR 9 - Transcript of Martha Jane Maloney).

Further examination of the record below we find that on January 3, 1969, Appellant was arraigned and entered a plea of not guilty and on March 3, 1969, Waiver of Trial by Jury was signed by the Appellant.

As aforesaid the trial commenced on March 4, 1969, and the Government presented two witnesses to prove the charges against the Appellant; one witness was the complaining witness, the other was a co-tenant and friend of the complaining witness. No other evidence of any kind was introduced at the trial.

In summarizing the testimony of the two witnesses nothing was testified to that could possibly link the Appellant to the crime of Second Degree Burglary as alleged or the crime of larceny as alleged.

The testimony for the Government taken in its most favorable light can only show that the defendant on October 7, 1968, was seen in his own neighborhood carrying a TV set which looked like the complaining witness' TV set, by the co-tenant of the complaining witness and the Appellant; and that the Appellant made an alleged admission that he knew the whereabouts of the complaining witness's property at knife point in a confined area.

As aforesaid, Appellant was convicted and sentenced for a period of Three (3) years to Ten (10) years on April 25, 1969, and on May 1, 1969, he filed his Notice of Appeal.

SUMMARY OF ARGUMENT

Presumption of innocence remains with accused throughout trial and Motion for Judgment of acquittal should be granted if Government's evidence considered in its most favorable light does not prove beyond a reasonable doubt that accused committed crimes charged.

Before an accused can be held to answer for a criminal offense there must be a showing of Probable Cause.

An extra-judicial statement may not be used to supply an element of a criminal offense, unless there is a showing of its thustworthiness and other substantial evidence that crime was committed.

Government failed to sustain its burden of proof and did not prove element of the crime charged.

ARGUMENT

I

MOTION FOR JUDGMENT OF ACQUITTAL SHOULD BE GRANTED BY THE COURT IF AFTER CONSTRUING GOVERNMENT'S EVIDENCE IN THE LIGHT MOST FAVORABLE TO IT AND ACCEPTING THE SAME AS TRUE THE EVIDENCE DOES NOT ESTABLISH BEYOND A REASONABLE DOUBT THAT ACCUSED COMMITTED CRIMES CHARGED.

This case was tried before the Court sitting without a jury and at its conclusion Counsel for Appellant argued a Motion for a Judgment of acquittal. (TR 24 - Martha Jane Maloney). This motion was obviously denied by the Court as it found Appellant guilty immediately after Counsel had concluded his argument on the motion and the merit of the case (TR 26 - Martha Jane Maloney). However, it was correctly pointed out to the Court that the testimony of the Government taken as a whole did not prove at all that Appellant committed any of the crimes for which he was charged.

When a Motion for Judgment of acquittal is made, the Trial Judge must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom. McFarland v. United States 163 A2d 627, Harris v. District of Columbia, 132 A2d 152, Sims v. United States 120 A2d 69. However, if the Court concludes on the evidence that there must be a reasonable doubt in a reasonable mind as to guilt of the accused, he must grant Motion for Acquittal. Curley v. United States, 160 F2d 229, Cooper v. United States, 218 F2d 39.

This was a short trial lasting only one day. No evidence of any kind was introduced by the Government except the testimony of

the complaining witness Alfred Lloyd Crump and his co-tenant and friend John L. Thomas. In Crump's testimony nothing is said that could remotely connect Appellant with burglarizing his room or taking his property except when he testified that on October 12, 1968, he observed Appellant at premises 1737 North Capitol Street in the following manner: (TR 11 - Ida Z. Watson).

> "Q. Now, would you tell us in your own words what happened when you observed the Defendant Whitaker?
>
> A. I went in the kitchen and got a steak knife, knocked on the bathroom door, and told him to come out.
>
> He opened the door, I told him to stay in, that I was going to keep him there until the police came. I called upstairs for Mr. Thomas to come down and call the police.
>
> Mr. Thomas came down. I had him backed in the bathroom, with the knife on him. And I asked him where was my clothes and T.V.
>
> So I said: Where are they?
>
> And he says to me: If I tell you, the people will be in as much trouble as I am."
>
> (See also pages 46 and 47 of the same Transcript)

The witness Thomas testified that he saw Appellant walking down the street with a TV in his hand (TR 52 - Ida Z. Watson) (Also TR 63-70 - Ida Z. Watson).

There can be no question that the testimony of Alfred Lloyd Crump pertaining to his confrontation with Appellant on October 12, 1968, should have been excluded from the testimony at the trial as inadmissible. The mere fact that the alleged statements if made were made at the point of a knife is sufficient to show that they were not voluntarily made. However, assuming for the sake of the argument that this testimony was admissible into evidence, what do they say

that would establish the crimes of Burglary and Larceny? We say they establish nothing; at best they could be construed as knowledge on the part of Appellant that he knew of the person or persons responsible for taking Mr. Crump's property.

The fact that witness Thomas claims he saw Appellant with a portable TV cannot be construed alone with nothing else as supportive of the fact that it was Crump's TV and Appellant stole it.

All that the evidence established was that Crump's property was missing, i.e. his TV and two suits and that Appellant occupied the room next door and Witness Thomas occupied a room upstairs. This evidence taking in its most favorable light is insufficient to convict for the crimes of Burglary II and Larceny.

The Court should have granted Appellant's Motion for Judgment of Acquittal.

THERE WAS NO PROBABLE CAUSE TO BELIEVE THAT APPELLANT COMMITTED OFFENSES CHARGED.

The record below clearly reveals that no preliminary hearing was conducted in this case and it would be pure speculation at this point to say whether or not if a preliminary hearing had been held, that Appellant would have been bound over for action by the Grand Jury.

In Blue v. United States, 342 F2d 894 at page 899, this Court spoke on Preliminary Hearings as follows:

> "We think, on the contrary, that the express preoccupation of Congress with preliminary hearings in the Legal Aid Act denotes a legislative recognition and acceptance of the view that criminal prosecution is a continuous and unitary process, and that each stage along the way has its own intrinsic importance as well as a frequently significant relationship to the final result. Preliminary inquiries can on occasion have great value for one charged with crime. Where a defendant is denied out of hand the opportunity to consider utilizing that value, we do not think that the denial is to be swept under the rug of a Grand Jury Indictment . . ."

This case presents us with the best example of why Preliminary Hearing should be held in this type of case instead of presenting them to the Grand Jury as Originals. There was no judicial determination in this case that there was Probable Cause to believe Appellant committed an offense as alleged. There was no arrest made so it's fair to assume that the police did not believe there was Probable Cause to arrest the Appellant for these alleged offenses. Nevertheless, this matter was taken directly to the Grand Jury and they returned a True Bill indicting Appellant for Second Degree Burglary

and Grand and Petit Larceny. But where is the Probable Cause? If the testimony presented to the Grand Jury was identical to the trial testimony there is no Probable Cause. A Grand Jury cannot by returning a True Bill find Probable Cause where no Probable Cause exist.

In an arrest without a warrant the Supreme Court of the United States held in Beck v. Ohio, 379 U.S. 83, 13 L ed 2d, 855 CT 223:

> "An arrest without a warrant by passes the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influence by the familiar shortcomings of hindsight judgment.
>
> "Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed." Wong Sun v. United States, 371 U.S. 471, 479, 480, 9 L ed 2d 441, 450, 83 S. Ct. 407. Yet even in cases where warrants were obtained, the Court has held that the Constitution demands a greater showing of probable cause than can be found in the present record. Aguilar v. Texas, 378 U.S. 108, 12 L ed 2d 723, 84 S. Ct. 1509; Giordenello v. United States, 357 U.S. 480, 2 L ed 2d 1503, 78 S. Ct. 1245; Nathanson v. United States, 290 U.S. 41, 78 L ed 159, 54 S. Ct. 11.
>
> When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would "warrant a man of reasonable caution in the belief" that an offense has been committed. Carroll v. United States, 267 U.S. 132, 162, 69 L ed 543, 555, 45 S. Ct. 280, 39 ALR 790. If the court is not informed of the facts upon which the arresting officer acted, it cannot properly discharge that function. All that the trial court was told in this case was that the officers knew what the petitioner looked like and knew that he had a previous record of arrests or convictions for violations of the clearing house law. Beyond that, the arresting officer who testified said no more than that someone (he

did not say who) had told him something (he did not say what) about the petitioner. We do not hold that the officer's knowledge of the petitioner's physical appearance and previous record was either inadmissible or entirely irrelevant upon the issue of probable cause. See Brinegar v. United States, 338 U.S. 160, 172-184, 93 L ed 1879, 1888, 69 S. Ct. 1302. But to hold that knowledge of either or both of these facts constituted probable cause would be to hold that anyone with a previous criminal record could be arrested at will."

A police officer may not arrest on mere suspicion, McFarland v. United States supra.

If Probable Cause is required before the police officer can make an arrest, then there certainly should be no less of a standard when a case is taken to the Grand Jury as an Original. Just as good faith is not enough on the part of an arresting officer, Beck v. Ohio supra, good faith should not be enough to enable the United States Attorney to present a matter as an Original to the Grand Jury.

Just as Chief Judge Bazelon stated in his concurring opinion in Coleman, et al v. United States of America, slip opinion No. 21, 804, etc... decided November 28, 1969, by the United States Court of Appeals, for the District of Columbia Circuit discussing Probable Cause and the criteria to be applied to Police Officers, Appellant submitts that the same standard as a bare minimum should apply to the authorities that present Originals to the Grand Jury.

There is a reference in the evidence that not only was the Appellant a co-tenant of the complaining witness in this case but that he was on parole (TR 15 - Martha Jane Maloney) and that Crump threatened to call his parole officer and taking the record as whole it is fair to assume that the only reason for charging Appellant with the

commission of these offenses is that there was some knowledge that he had previously been convicted of some crime in the past.

There was never been any showing of Probable Cause in this cause from its inception to the end of the trial and although this question was not raised below or at least the record does not indicate that it was, it should be considered by this Court under the plain error provisions of Rule 52(b) of the Federal Rules of Criminal Procedure.

ARGUMENT

III

THE CONVICTION OF BURGLARY II CANNOT BE SUSTAINED WHERE THERE IS NO EVIDENCE IN THE RECORD THAT THE DEFENDANT WAS EVER INSIDE THE COMPLAINING WITNESS' APARTMENT.

The criminal offense of Burglary II as codified in Title 22-1801(b) of the District of Columbia Code requires that the Government prove as essential elements, an entry, either lawful or unlawful, coupled with a specific intent at the time of such entry to; "break and carry away any part thereof or any fixture or other thing attached to or connected with the same, ortto commit any criminal offense...."

The record in this case is completely void of any evidence whatsoever that the defendant was at any time seen in the complaining witness' apartment. Neither of the Governments witnesses' offered any testimony as to whether the defendant was ever in the apartment nor did the Government offer any evidence in the nature of finger prints or otherwise which could possibly place the defendant in the complaining witness' apartment at any time.

There is likewise no evidence in the record herein which can go to the issue of intent and even if such evidence were in the record, it could not stand alone for the reason that there is no proof of an entry.

Where an essential element of a criminal offense is not proved at trial, the Government fails in its burden and a judgment of Acquittal must necessarily follow.

ARGUMENT

IV

THE CONVICTION OF PETIT LARCENY CANNOT BE SUSTAINED WHERE THERE IS NO EVIDENCE IN THE RECORD THAT THE DEFENDANT EVER HAD POSSESSION OF THE PROPERTY IN QUESTION NOR IS THERE ANY EVIDENCE OF A TAKING OF THE PROPERTY IN QUESTION, FELONIOUSLY OR OTHERWISE.

Title 22-2202 of the District of Columbia Code provides:

> "Whoever shall feloniously take and carry away any property of value less than $100, including things savoring of the realty, shall be fined not more than $200. or be imprisoned for not more than one year, or both...".

Thusly, there are two elements of the offense of Petit Larceny which, on the record, have not been proved by the Government. The defendant in this case was tried for, among other things, the theft of two suits allegedly belonging to the complaining witness. That (TR 6 - Ida Z. Watson) is the government's only proffer as to the theft of the suits:

> "Q. Now, do you know the defendant, Willie Whitaker?
> A. I do.
> Q. And how is it that you know him?
> A. I know him because he lived in the next room to me.
> Q. I see. How long did he live in the next room to you?
> A. I'd say about three weeks to a month.
> Q. All right. Now, when you returned to your apartment about four p.m. on October 6, 1968, a Sunday, did you notice anything missing?
> A. Yes, sir, there was two suits missing.
> Q. And can you describe the suits to us?
> A. They were grey suits. Both were grey. One was a light grey with red lining; the other one a dark grey.
> Q. All right. Now, can you tell us how much these suits cost you?"

The rest of the witness' testimony was as to value with nothing

offered to connect the defendant with these missing suits. On this evidence the defendant was convicted of Petit Larceny. At no time was the defendant seen with this property nor was it ever recovered. This evidence is insufficient to sustain a conviction of Petit Larceny. Hiet v. U. S. 124 U.S. App. D.C. 313, 365 F2d 504.

Under another count of the indictment the defendant was tried and convicted of the theft of a silvertone, beige, portable television set allegedly belonging to the complaining witness. At (TR 51 - Ida Z. Watson) appears the Governments evidence on that count;

> Q. Did there come a time around two or two-thirty on the afternoon of Monday, October 7, 1969, when you observed the defendant Willie Whitaker?
> A. Yes.
> Q. Would you tell us where you were when you observed him?
> A. I was sitting there looking out the window, just like I am looking at you, and I said --
> Q. Just answer the question.
> THE COURT: Where were you?
> THE WITNESS: 1737 North Capitol Street.
> THE COURT: Where?
> THE WITNESS: Sitting in my room, looking out the window.
> THE COURT: All right.
> BY MR. RAUH:
> Q. And where does your window look out upon?
> A. Look right down the steps out on the Street.
> Q. Does it look down on the front part of the apartment?
> A. That is right, right down on the front porch.
> Q. Where did you see Mr. Whitaker?
> A. I saw him when he came out the door, went down the steps, and went on down the Street, and turned the corner.
> Q. Did you see him carrying anything at that time?
> A. He was carrying a TV.
> Q. All right. Did you recognize that TV?

A. I did.
Q. And whose TV did you recognize it as?
A. As Crump's.
Q. And when Mr. Crump returned that evening, did you tell him what you observed?
A. I didn't tell him, not then. Crump came up the steps and said: My TV is gone.?

Thus concluded the Government's evidence as to the theft of the TV. This property was never recovered by the Government nor was any other evidence offered to show that in fact it was Crump's TV. Evidence that the defendant was in proximity carrying an object similar to the object in question but not otherwise identified is insufficient to sustain a conviction. Davis v. United States, 230 A2d 485, McGilton v. United States, 140 A2d 190.

ARGUMENT

V

AN EXTRA-JUDICIAL ADMISSION MAY NOT BE USED TO SUPPLY A MISSING ELEMENT OR PART OF THE CORPUS DELICTI OF A CRIMINAL OFFENSE UNLESS THERE IS A SUBSTANTIAL SHOWING THAT THE ADMISSION IS TRUSTWORTHY AND SUBSTANTIAL EVIDENCE THAT THE OFFENSE WAS COMMITTED.

There is in the record certain inexculpatory statements allegedly made by the defendant concerning the property involved in this case. However, it must be said with all candor that it is difficult to conceive of more coercive and horrendous circumstances than those which the Government's complaining witness describes in his own words at (TR 11 - Ida Z. Watson):

> "Now, would you tell us in your own words,what happened when you observed the defendant Whitaker?
> A. I went in the kitchen and got a steak knife, knocked on the bathroom door, and told him to come out. He opened the door. I told him to stay in, that I was going to keep him there until the police came. I called upstairs for Mr. Thomas to come down and call the police.
> Mr. Thomas came down. I had him backed in the bathroom, with the knife on him. And I asked him where was my clothes and TV.
> He said: If you let me go, I will bring your things back.
> So I said: Where are they?
> And he says to me: If I tell you, the people will be in as much trouble as I am.
> At that time, Mr. Thomas came down and pulled me down the hall, and this defendant ran out the back door."

It is submitted that under the circumstances above described, nothing the defendant said can be taken as voluntary.

Applying the test as set out by the United States Supreme Court in Opper v. United States, 348 U.S. 84, 75 S. Ct. 158, 99 L. Ed. 101 and Smith v. United States, 348 U. S. 147, 75 S. Ct. 194, 99 L. Ed. 192 that corrobative evidence, need not be sufficient, independent of an admission to establish the corpus delicti, but the Government must

introduce substantial independent evidence which would tend to establish the trustworthiness of the admission. The corroboration is sufficient if it supports the essential facts admitted to such a degree that a jury would be justified in inferring that the admission was true. Thus, all the elements of the offense must be established by independent evidence or corroborated by admissions and where an element of the corpus delicti is supplied by an admission alone, the prosecution must provide substantial independent evidence to show the trustworthiness of the admission. See Brinkel v. District of Columbia, 122 A2d 769, 771.

On this record, the Government has not complied with the above-mentioned standards and as such has not carried its burden of proving every essential element of each offense charged beyond a shadow of a doubt as a matter of Law.

Respectively Submitted:

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I CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was served on the United States Attorney for the District of Columbia; United States Courthouse, Washington, D. C., 20001, this 18th day of February, 1970.

Robert A. Harris

Robert A. Harris